Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD BOYAJIAN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FOURTH APPELLATE DISTRICT DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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4pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether (a) the privacy of the attorney-client relationship essential to the Sixth Amendment right to assistance of counsel may be overridden by exceptions to the Fourth Amendment warrant requirement, and (b) whether resulting penetration of the defense violates the Sixth Amendment.

2. Whether the State of California Courts have misapplied the principles of McNeil resulting in violating Massiah and the petitioner's right to counsel under the Sixth Amendment.

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IN THE SUPREME COURT OF THE UNITED STATES

RONALD BOYAJIAN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

The petitioner, Ronald Boyajian, respectfully prays that a writ of certiorari issue to review the judgment in the Court of Appeal of the State of California Fourth Appellate District Division Three entered on December 31, 1998.

OPINION IN THE COURT BELOW

The Court of Appeal of the State of California Fourth Appellate District Division Three entered its unpublished opinion affirming the conviction of petitioner on December 31, 1998. A copy of the opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On December 31, 1998 the Court of Appeal of the State of California Fourth Appellate District Division Three entered its opinion affirming the conviction of petitioner in this case. A copy of the opinion is attached as Appendix A.

On March 31, 1999, the Supreme Court of the State of California filed an order denying the petition for review. This order is attached as Appendix B. The Court of Appeal of the State of California Fourth Appellate District Division Three had previously filed an order denying the petition for rehearing on January 29, 1999. This order is attached as Appendix C. This Court's jurisdiction to review the judgment of the Court of Appeal of the State of California is conferred by 28 U.S.C. 1254

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTH AMENDMENT
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SIXTH AMENDMENT *(in relevant portion)*
In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

I. Course of the Proceedings and Facts Material to the Issues

Petitioner was convicted by jury in a consolidated trial of 18 counts of consensual unlawful sexual intercourse with two 16 - 17 year old teenage minors, (CA Pen. Code § 261.5) and four counts of consensual unlawful oral copulation with one of the minors (CA Pen. Code §288a, subd.(b)(1)).

Appellant was arrested and arraigned on misdemeanor charges involving unlawful sex with Kristen S., which were filed on March 10, 1993 by the Orange County District Attorney. Sgt. O'Sullivan, of the Newport Beach Police Department, was in personal charge of the Kristen investigation. On May 27, 1993 petitioner 's counsel, Marshall Schulman, appeared and entered pleas of not guilty, and the case was pending trial. The pending offenses were refiled and raised to felonies in the course of subsequent numerous proceedings where petitioner was represented by attorney Schulman throughout. (RT 1769-1770)

Newport Beach Police Officer Sgt. O'Sullivan, while investigating the Kristen S. case which was pending trial, and for which he had appeared at the preliminary hearing, personally initiated an investigation of 16 year old Shauna C.'s activities in the city of Irvine, and then turned his investigation over to Detective Prouty, his junior subordinate officer in the same Newport Beach Police Department unit.

On October 15, 1993, seven months after the initiation of the Kristen criminal judicial proceedings against petitioner, and for which petitioner was still represented by attorney Schulman, Shauna C., was a confidential police agent [RT 1641] working on behalf of the Newport Beach Police Department and, in conjunction with the Orange County District Attorney's office, placed a scripted tape-recorded set-up call to the petitioner from the police station. (RT 1221-1222) Petitioner was later arrested for charges involving consensual unlawful sexual intercourse with Shauna C. Attorney Schulman appeared for petitioner on the Shauna case on October 21, 1993 and numerous proceedings ensued in parallel as to both the Kristen case and the Shauna case, including their ultimate consolidation for a single trial.

The District Attorney of Orange County actively sought consolidation of counts involving Kristen and Shauna on

the theory that the cases involved the same class of crimes and were connected together in their commission by numerous common elements of substantial importance. Ultimately the District Attorney succeeded; the charges involving the two girls were joined and tried together, and defense request to sever was denied. (CT 138-173, see also RT 1768-1774]

On March 14, 1994, about 4 PM Sgt. O'Sullivan and detective Prouty made a vehicle stop of petitioner just after he received confidential materials from his attorney Schulman, and in which vehicle their own confidential police agent Shauna was a passenger. The officers then placed petitioner under arrest for being in the presence of Shauna in violation to the bail condition, followed by a search and seizure of the contents of the vehicle. Sgt. O'Sullivan broke the key to the car and had the vehicle impounded.

At the Municipal court proceeding the following day, March 15, 1994, the court granted the defense motion that the seized documents and tapes not be reviewed. The court issued its order for law enforcement and the District Attorney's office to not further review any documents. People submitted as to the documents and stated they had already listened to the tapes. Attorney Schulman, raised both Sixth amendment and Fourth Amendment issues in the Municipal Court (CT 786-787) Additional unlawful sexual intercourse charges involving Shauna C. were filed against petitioner .

At the Superior Court penal code section 1538.5 hearing on the defense motion to suppress the seized materials, petitioner testified that the closed bags in his vehicle contained documents that he prepared for his attorney Schulman. Petitioner also testified, that he informed one of the officers that Mr. Schulman must be contacted immediately because petitioner was in possession of confidential material he had just *received* from attorney Schulman. Petitioner insisted that counsel should be

informed before anyone touched anything in the car. (RT 154-155, 170-171)

While searching the bags Detective Prouty observed notebooks with writings by appellant concerning attorney, Marshall Schulman. Schulman was known by the officers to be appellants defense attorney as to the pending Kristen charges and the pending Shauna charges. Detective Prouty testified the seized materials included what Schulman will attempt to do to do as far as the case is concerned, talk about the trial, the investigation, and possible defenses. (RT 106-107, 110.)

Sgt. O'Sullivan and Detective Prouty continued to examine these materials later at the police station in great detail, reading every word, listening to every tape, over several separate days, without ever obtaining a warrant. Among the seized materials were several hundreds of pages of material [RT 104], over 500 items of evidence and documents [RT 389-390].

At some point, Detective Prouty received a telephone call from the District Attorney, directing him to stop reviewing the tapes and documents without further guidance from that office. (RT 113.) Detective Prouty further testified that that request was prompted by a request from petitioner's attorney, Mr. Schulman, who asked that the police refrain from searching until he had an opportunity to ascertain whether there were attorney client materials in the bags. (RT 114) Although no warrant was ever sought or obtained the search was resumed by Prouty on orders from Sgt. O'Sullivan who told Detective Prouty he had "received word" that they could continue examining the evidence. (RT 114.)

The court denied the motion to suppress on the basis that the materials were properly seized incident to arrest and that the evidence was admissible under the doctrine of inevitable discovery. [RT 189]

The defense at trial attacked the credibility of the two women using their prior statements to police and the courts, letters, and diaries. Defense counsel also elicited the witnesses' substantial monetary incentives for the defendant's conviction. Defendant did not testify at trial.

At trial, over defense objection on 6th Amendment right to counsel under Massiah, an audiotape of the police scripted Shauna set-up call to petitioner of October 15, 1993 was played for the jury. (RT 1224, 1768.) Shauna's opening question in the scripted set-up call was "**Is your attorney there**?" The jury heard through the taped conversation references to the Kristen case, the investigations, and Shauna, including discussion that Shauna did not have to talk to the police until the Kristen case was over.

At mid-trial, the court declined defense request and inquiry for a preliminary hearing before the court would determine what portions of the seized documents and tapes it would permit the District Attorney to introduce. (RT 1264) In sorting through the seized materials which the District attorney intended to introduce, the court repeatedly stated the materials were clearly lawyer-client trial preparation, and acknowledged by both the defense counsel and the District Attorney. (RT 1290-1301) The court permitted redacted portions of the materials to be admitted after defense objection, "It is all a violation of Massiah."(RT 1301)

The redacted tapes and documents were played and introduced to the jury over re-objections by the defense. The court on several occasions assured counsel that all of his objections, had been made and would be continuing and that he need not make them further. Two related defense motions for mistrial resulted when a portion of materials previously ruled inadmissible were introduced to the jury, which motions were denied (RT 1927-1930)

At the final day of trial, late disclosed evidence from the recorded interview between Sgt. O'Sullivan and Shauna immediately after the petitioner's arrest on March 14, 1993 at about 4 PM. The additional facts and sequence of events were that both Shauna and Kristen retained the same civil attorney to sue petitioner, and spoke with Sgt. O'Sullivan, several hours before the Shauna called petitioner to meet her in violation of the bail order resulting in the arrest. Shauna testified she wrote out before the meeting how she intended to spend the $300,000 she expected to receive upon petitioner's conviction.

II. When Federal Issues Were Raised & Passed On

A. Sixth Amendment Right To Counsel Under Massiah: as to the Shauna C. set-up tape

The defense raised objections at trial of the Sixth Amendment violation of the defendant's right to counsel under Massiah as to the playing of the Shauna set-up tape to the jury.(RT 1224, 1768.)

The trial court denied the motion to exclude the conversation, concluding that no Sixth Amendment violation resulted from use of the tape-recording because the investigation of the Shauna C. allegations was independent of the investigation of the pending Kristen S. charges, and the conversation between appellant and Shauna did not in any way involve the facts of Kristen's case (RT 1773-1774.

Petitioner raised on appeal that the trial court erred in permitting the playing of the Shauna set-up tape under the McNeil "specific-offense" limitation. (AOB, pp. 68-74, ARB 28-34) The court of appeal concluded there was no error, indirectly citing the McNeil "offense-specific" limitation. The court of appeal also stated, "In any event, any error could only have been harmless. Given the sum of the evidence against defendant, there is no reasonable

probability he would have obtained a more favorable outcome absent the admission of the tape-recorded conversation."(opn. p. __)

Petitioner again raised this Massiah issue on a petition for rehearing, which was denied. This Massiah issue was also raised in a petition for review to the Supreme Court of California, which was denied.

B. Sixth Amendment Right To Counsel:

i. Invading the Attorney-Client Relationship through the Seized Materials

ii Massiah Claim as to the Seized Materials

Defense counsel raised a Sixth Amendment right o counsel concern in the Municipal Court hearings on March 15, 1994 and on March 23, 1994 [CT 786-787] after the warrantless search and seizure and arrest of petitioner on March 14, 1994 for Shauna's presence with him in the vehicle in violation of the bail condition to not see Shauna. At trial, counsel Schulman objected to the court's redacting and rulings on admissibility of portions of the seized materials the District Attorney wished to present to the jury, as work product and Massiah violations. The court found there was substantial amount of "lawyer -client trial preparation material. [RT 1301] The court ruled the redacted materials would be allowed, without citing any reason [RT 1312-1322]. As each item in dispute was eventually introduced to the jury, the court assured the re-objecting defense counsel "I think it's clear you have made the appropriate objections, each and every available one..."[1976-1977] and "I appreciate you've made and we've had hearing on several of the exhibits that have been received, particularly the tapes, the cassettes, the handwritten notebooks and other papers, and the court's permitted portions thereof into evidence. They will all be received with Mr. Schulman's caveat that the objections he's raised

heretofore are not waived by not further making them at this time and that they continue on. Is that fair?
[District Attorney] McNerney: Yes, your Honor..." [RT 2004-2005].

The Sixth Amendment right to counsel issue was raised in conjunction with the Fourth Amendment violation issue on appeal (see AOB pp. 85-87, ARB PP. 36-39). The court of appeal did not address petitioner's Sixth Amendment claim. Petitioner re-raised his Sixth Amendment claim in the petition for rehearing, which was denied. The Sixth Amendment issue was raised on petition for review in the Supreme Court of California, which was also denied.

C. Fourth Amendment; Protection From Unreasonable Search and Seizure Of Private Papers, therein, included Materials Protected by Attorney-Client Relationship

On March 15, 1994, the day following the warrantless arrest and search and seizure of petitioner in the vehicle stop for being in the presence of Shauna c in violation of a bail condition, defense counsel moved for a protective order so that law enforcement and the District Attorney office would not further review the seized materials. The court granted the motion. [CT 786-787]. Counsel raised his concern about both Fourth and Sixth Amendment issues on March 23, 1993 in the Municipal Court. The subsequent defense motion to suppress in the Superior Court was denied, on the basis of inevitable discovery, and search incident to arrest. [RT 189]

On appeal, the Fourth Amendment issue reinforced by appellant's Sixth Amendment right to counsel issue as to the seized materials were again raised (AOB pp. 85-87, ARB pp. 36-39). The court of appeal agreed with the trial court that the warrantless search of the seized materials permissible under both inevitable discovery and search incident to arrest.

Petitioner re-raised the Fourth amendment warrantless search of the seized "protected" materials again in conjunction with the Sixth Amendment aspects in a petition for rehearing, which was denied. The same issue was raised on petition for review to the Supreme Court of California, which also denied review.

REASONS FOR GRANTING THE WRIT

THE DECISIONS IN THIS CASE CONFLICT WITH THE *PRECEDENTS* OF THIS COURT ON IMPORTANT ASPECTS OF THE SIXTH AND FOURTH AMENDMENTS

Introduction

Seldom does a case present so vivid a confluence of Sixth and Fourth amendment issues. The grounds for review set forth have yet to be squarely decided by this Court. This Court's past decisions do suggest, however, that the ruling of the trial court and the court of when considered in the context of the competing consitutional interests this case presents, are open to serious doubt. They require resolution by this Court.

I. Right to counsel: penetrating the defense through attorney client privilege and work product

The right to privacy of confidential communications between a criminal defendant and his defense counsel is the essence of the Sixth Amendment protection. Moreover, the trial court's statements and the District Attorney's concessions, illustrate that defense work product was in the hands of the prosecution, which itself was arguably obtained through possible violation of Massiah v. United States, 377 US 201 (1964) suggests the purpose and safeguards of the attorney-client relationship may require additional scrutiny under current constitutional doctrines.

The principles enunciated by some of this Court's earlier decisions impacting the viability of attorney client relationships under various challenges to disclosure may not have yet adequately reached such issues as raised in petitioner's case. Weatherford v. Bursey, 429 U.S. 545 (1977), Swidler & Berlin v. United States, 524 U.S. 399 (1998) United States v. Zolin, 491 U.S. 554 (1989) Upjohn Company v. United States 449 U.S. 383 (1981) .

II. Applicability of Fourth Amendment warrant requirement to protect attorney-client privilege and work product material.

One principle enunciated in the far-reaching decisions embodied by this Court in Stone v. Powell (1976) 428 U.S. 465, stated that one's papers are totally different than typical crime scene evidence. This case brings to the forefront whether privacy of papers, tapes, or other media are or can be protected under current Fourth Amendment doctrine.

When a search involves disclosure of materials entitled to the protection of the attorney-client privilege, application of Fourth Amendment principles may conflict with the Sixth Amendment's right to counsel; it remains unclear whether despite the normal application of an exception to the Fourth Amendment's warrant requirement, a search warrant nevertheless must be obtained when the People seek access to privileged matters. That is the question here.

With knowledge that petitioner had been charged in the Shauna matter and released on bail on condition that he refrain from contacting her, police investigators acting on a [anonymous] tip stopped the automobile that appellant was driving and in which Shauna was a passenger, placed him under arrest, and seized the vehicle's contents, including documents and tapes that petitioner maintained were confidential privileged communications with his lawyer, then

later examined these materials in detail--without first obtaining a search warrant.

The justification relied upon was the custodial arrest as the predicate for the *seizure* of appellant's assertedly protected materials.The court of appeals rejection of petitioner's challenge to the subsequent *inspection and review* of the tapes' and documents' contents at the police station under Michigan v DeFillipo (1979) 443 U.S. 31, 34, is based on a faulty analogy. More apt, petitioner has suggested, is the resolution of the balance of constitutional rights implicated by cases involving the subsequent warrantless search of material protected under the First Amendment, under Justice Stewart's concurring opinion in Stanley v. Georgia (1969) 394 U.S. 557, 569-572, as adopted by the plurality in Walter v. United States, 447 U.S. 649, 653-660. The proper resolution of this constitutional tension represents an important question that has evaded this Court's review thus far.

III. Applicability of the "'offense-specific' limitation": unanticipated circumstances make McNeil precedent irreconcilable with the Sixth Amendment

This case also presents important questions under Massiah v. United States (1964) 377 U.S. 201. As was true when this Court first addressed the scope of McNeil v. Wisconsin, 501 U.S. 171, at 187 "The Court therefore does not flesh out the precise boundaries of its newly created "offense-specific" limitation on a venerable constitutional right."(Stevens, J., dis.) Two important aspects of McNeil's holding are at issue here. The first is whether the interrelated nature of the Kristen and Shauna charges invoked the exception some courts have recognized to the "offense-specific" limitation, "'when the pending charge is "so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the

uncharged offense."'" (U.S. v. Martinez, 972 F2d.1100, 1100-1103-1104, quoting U.S. v. Hines (9th Cir. 1992) 963 F2d 255, 257. The second is whether, assuming the admissibility of the phone conversation between Shauna and petitioner concerning the as-yet uncharged Shauna offenses (Maine v. Moulton, 474 U.S. 159, 180, fn. 16), was that evidence nonetheless inadmissible as to the Kristen charges under Moulton and Massiah?

Neither the conclusion of the trial court or the court of appeals is supported by this Court's statements in McNeil; both lower courts enlarge McNeil's "limitation" beyond its stated purpose and threaten to undermine the Sixth Amendment principles established by Massiah. Their proper application is squarely at issue here; the necessity to review them is plain.

Discussion of Sixth Amendment, Fourth Amendment

A significant aspect of petitioner's contention that this motion to suppress was erroneously denied is based on the authorities' discovery of attorney-client privileged documents and cassette tapes, which petitioner has contended precipitated the need for a warrant under the Fourth Amendment as reinforced by his Sixth Amendment right to counsel. (AOB, pp. 85-87; ARB pp. 36-39.)

Indeed, the fact that shortly thereafter the District Attorney became involved in advising the officers whether the search should continue logically supports if not compels the inference that the potential for a breach of the privilege was called to the officers attention-- and thereafter ignored. It strains credulity to imply that the People may not have been on notice of the necessity for a warrant.

The record is undisputed that the government -- the police *and the District Attorney's office* -- had been informed by petitioner's attorney that the bags contained documents

appearing to memorialize confidential legal communications concerning appellants pending criminal charges. Yet after short cessation of the search, a deliberate decision was made to continue a word-by-word examination of petitioner's writings and audiotapes without submitting these items to a magistrate to screen for items protected by the attorney-client privilege. With what Prouty and O'Sullivan knew, not to mention the prosecution's involvement, the decision to proceed with that review absent a search warrant was indefensible.

The court's refusal to be troubled by the probing inspection of petitioner's writings and tapes at the station long after his arrest is inexplicable. That determination only begs the question whether the authorities ever have a duty under the Fourth Amendment to obtain a warrant before proceeding further with a search of evidence permissibly seized as incident to arrest when they discover attorney-client privileged materials such as appellant's notebooks and tapes. As does the court's suggestion that once the incriminating materials were seized and examined--but only superficially at the arrest site, "[t]o the extent the officers conducted further review, it was not a new search." (opn. p.__.) How else is one to describe the minute and methodical search and inspection of the same items at the police station as was evident from the officers' description of how that later "search" was conducted? Nor is there merit to the suggestion that "the situation appears analogous to testing of suspected controlled substances seized at an arrest site to confirm the presence of drugs." (Ibid., citing Michigan v. DeFillipo, supra, 443 U.S. at p. 34.)

In contrast with the questionable analogy to the seizure and subsequent testing of contraband drugs, appellant has advance d this Court's 1980 decision in Walter v. United States, supra, 447 U.S. 629 which requires more rigorous analysis of warrantless intrusions by law enforcement when competing constitutional interests are at stake. In Walter, of course, an accused's First Amendment privacy interests

triggered the warrant requirement; here, petitioner's vital interest in the confidentiality of his attorney-client communications, and work product material, interests implicating the Sixth Amendment right to counsel, was the significant factor. In such circumstances, Walter tells us that the existence of probable cause to believe the seized items contained evidence of a crime is not enough to excuse the failure to obtain a warrant as a condition to further scrutiny. That message was not heeded by the officers; now it is ignored by the lower courts.

The analogy to Michigan v. DeFillipo, supra, 443 U.S. 31 is incorrect. Neither the First Amendment nor the Sixth amendment comes into play when *contraband* is lawfully seized and thereafter subjected to the further search entailed in laboratory testing to analyze the exact contents of the suspected unlawful substance. When a lawfully seized writing appears to contain matter protected by the attorney-client privilege, however, scrupulous adherence to the Fourth Amendment's warrant requirement must be observed to avoid infringement of important Sixth Amendment interests. Apt in that situation is this Court's recognition, "if probable cause dispensed with the necessity of a warrant, one would never be needed." (Walter v. United States, supra, 447 US at p. 657, fn.10.) That is a core principle which should control this claim.

The court of appeals questionable reliance upon DeFillipo -- its opinion never mentions Walter, cited repeatedly by appellant-- is equally troubling in its alternative conclusion that the trial court properly also held the search was justifiable under the inevitable discovery doctrine. (opn., pp. 8-9, citing Nix v Williams, 467 U.S. 431.) In petitioner's case, however, the People's ultimate access to the challenged evidence is not a foregone conclusion. Intrusions into the "defense camp" and trial strategy by police and prosecution raise serious due process concerns , which can be avoided by appropriate referral to a magistrate which can result in protective orders after in camera review .

Thus, the inevitable discovery doctrine can be applied here only by sailing in uncharted water.

Both rationales on which the court of appeal upheld the denial of petitioner's motion to suppress evidence in this case failed to consider important competing values inherent in the search of contents of otherwise lawfully seized documents that the authorities are *on notice* contain confidential information *privileged* as between the defendant and his attorney. Whether the Fourth Amendment absolutely requires that a search warrant be obtained is unsettled in the circumstances, but the analogy to cases involving the testing of the contents of contraband is clearly misplaced; the constitutional and statutory protections afforded the right of counsel and maintaining inviolate the privilege of confidential communications suggests that the requirement of a warrant when materials are protected either by the Sixth or the First Amendment is a more appropriate analogy. Finally, those same interests defeat reliance upon the inevitability of access to such protected materials, at least on a record such as this where the authorities deliberately subverted those protected interests. This court should grant review to resolve these important questions.

2. **Eviscerating Massiah and the closely related doctrine -- through invasion of the Right to the assistance of counsel: defendant faced with superior legal acumen of prosecutor**

Two important and related questions arising under the Sixth Amendment right to counsel are presented by the trial court's ruling admitting Petitioner's tape-recorded conversation with Shauna, prearranged and scripted by the police, at a time when "adversary judicial proceedings" already were pending against Petitioner in connection with the Kristen charges. Both stem from the 1991 decision of the Supreme court establishing an "offense-specific" limitation on the Sixth Amendment right to counsel in McNeil. The focus of these

two problems, however, is distinct. Their factual context may be briefly summarized.

The defense argued that use of the Shauna set-up tape violated Petitioner's Sixth amendment rights as established by this Court's seminal 1964 decision in Massiah, because he was already represented by counsel on the closely-related Kristen charges when the October 15, 1993 set-up call from Shauna was instigated by the same investigating officers. (RT 1768-1773.) It was undisputed that by then Petitioner had been arrested and arraigned on felony charges involving Kristen, which had originally been filed on March 10, 1993; on May 27, 1993, Petitioner had an attorney, he had entered pleas of not guilty and the case was pending trial. (RT 1769-1770.) Nevertheless, the trial court denied the motion to exclude the conversation, concluding that no Sixth Amendment violation resulted from use of the tape recording because the investigation of the Shauna C. allegations was independent of the pending Kristen S. charges, and the conversation between Petitioner and Shauna did not in any way involve the facts of Kristen's case. (RT 1773-1774.)

In Massiah, the United States Supreme Court held that neither state nor federal governments may use an undercover agent to circumvent the right to counsel guaranteed the accused by the Sixth Amendment once that right has attached. As later explained in McNeil v. Wisconsin, supra, 501 U.S. at p.175, the Sixth Amendment right to counsel attaches once a prosecution is commenced by the initiation of adversary judicial criminal proceedings, by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Insofar as Petitioner's statements were ruled admissible in connection with the Shauna C. charges, the applicability of McNeil's "offense-specific" limitation of Massiah presents a challenging question. The People argued, and the trial court found, that the Sixth Amendment right to counsel had not yet attached to the offenses involving Shauna at the time of the

October 15, 1993 telephone conversation since adversary judicial criminal proceedings had not yet been initiated as to those charges. The court's determination disregards abundant factual indicia of the interrelated nature of the Kristen and Shauna charges, and the exception to the "offense-specific' limitation some court's recognize "'when the pending charge is so "inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense."'" (U.S. v Martinez, supra, (9th Cir. 1992) 972 F2d 1100, 1103-1104, quoting U.S. v Hines, supra, (9th Cir. 1992) 963 F2d 255, 257; see also U.S. v Melgar (4th Cir. 1998) 139 F.3d 1005 [new federal charges involving the same conduct as pending state case were inextricably intertwined].)

In virtually all salient respects, petitioner's case has no parallel to the facts in McNeil, wherein here the Kristen and Shauna investigations could not have been more inextricably intertwined. To begin with, the two investigations were being simultaneously handled by the same officers of the Newport Beach Police Department, Detective Prouty and Sgt. O'Sullivan. The charges were the same, involving unlawful acts of sexual intercourse and /or oral copulation with teenage minors. Moreover, much of the sexual activity with both girls allegedly occurred in appellant's Newport Beach apartment, in motels, or in his car at locations in Irvine. Furthermore, by October 15, 1993, the many parallels between the two cases had already been recognized by the investigating officers. O'Sullivan and Prouty were actively pressuring a reluctant Shauna to cooperate with the prosecution, using such techniques as playing for her the tape-recorded conversation of appellant speaking with Kristen. (RT 1428.) Additionally, the same defense counsel was representing petitioner simultaneously in both case before and after consolidation.

Accordingly, on October 15, 1993, Petitioner's Sixth Amendment right to counsel in the pending Kristen case

could not be properly isolated, for constitutional purposes, from his right to counsel with respect to the as-yet uncharged Shauna crimes. Proof that Petitioner had employed similar means of initiating and perpetuating an unlawful sexual relationship with Shauna as he employed with Kristen necessarily strengthened law enforcement's case against him in the Kristen prosecution, which unquestionably had commenced seven months earlier. The fact that the police had other legitimate reasons for eavesdropping-- t o obtain evidence supporting independent allegations of unlawful sexual activity with Shauna-- did not mean that evidence of the tape-recorded conversation was admissible, without any limitations as to its use, at the consolidated trial of all charges involving Kristen and Shauna. To allow such unrestricted use of the evidence by the People effectively eviscerated Petitioner's Sixth amendment right to counsel as to both sets of crimes. (Maine v Moulton, supra, 474 U.S. 159, 178-180; The intertwined relationship of the Kristen S. and the Shauna C. charges distinguishes this case from McNeil.

Even assuming the tape-recorded conversation with Shauna was properly admitted for the limited purpose of proving the charges involving Shauna (Maine v. Moulton, supra, 474 U.S.at p.180, fn.16), the question remains as its admissibility to prove the charges involving Kristen. In overruling petitioner's Sixth Amendment objection to the evidence, the trial court assured counsel of its intention to give instructions addressing the limited use of the evidence, presumably as to the Shauna charges; however, no such instructions were in fact given. (RT 1773.)

In its haste to reject Petitioner's Sixth Amendment argument based on Massiah v US, supra, 377 U.S. 201 that the tape-recorded conversation with Shauna must be excluded as to all counts, the Court of Appeal completely neglected to address a critical component of the argument, viz., that even if Shauna's conversation with Petitioner was admissible to prove the counts involving *Shauna*, that evidence was *not* admissible as substantive evidence to prove the *Kristen*

charges without violating Massiah. (see AOB, pp. 73-74, ARB, pp. 28-34.) Petitioner requests a determination of *that* issue as well.

The court also went astray in holding McNeil dispositive of appellants entire Massiah claim. Even assuming the court correctly applied McNeil as supporting the introduction of the tape-recorded conversation with Shauna *to prove the charges involving Shauna*, by no stretch of the imagination does McNeil sanction the unrestricted use of the tape-recording *to prove the counts in which Kristen is the alleged victim*. The "offense-specific" limitation is just that, namely, an exception to the application of Massiah's Sixth Amendment principles. If appellant's right to counsel attaches to offense as to which adversary judicial criminal proceedings have been initiated--and to such offenses alone, how can it be said that McNeil controls the Kristen charges?

The cross-admissibility of the *charges* pursuant to evidence code section 1101 for severance purposes has no bearing because it does not speak to claim that a Sixth amendment violation results form allowing use of a particular *piece of evidence* obtained in disregard of Massiah. Even when a defendant's crimes are adjudged cross-admissible, it does not inexorably follow that every piece of evidence proving one crime is admissible to prove all others.

The lower court's improper and extension of McNeil limitation, goes far beyond the principles stated in Massiah or McNeil. To permit subtantive use of evidence of the conversation with Shauna to prove the Kristen counts would mean that any agent of law enforcement with legitimate reasons to continue investigating a defendant's criminal activities could easily circumvent the right to counsel in any pending case by surreptitiously inducing inculpatory statements related to uncharged criminal acts as to which the right to counsel had not yet attached; such statements could then be used without limitation in a trial consolidating

original and new charges with those pending when the statements were obtained without the benefit of counsel.

Accordingly, as Petitioner urged below (see AOB, pp. 73-74; ARB, pp. 28-33) -- but the court of appeal inexplicably failed to address -- it is Maine v Moulton that governs the disposition of the Kristen counts. Incriminating statements obtained in violation of Massiah principles are inadmissible to prove charges as to which the right to counsel had attached even if the statements were obtained during the good faith investigation of other crimes. (Moulton, supra, at p. 180.) Conversely, under Moulton incriminating statements pertaining to other crimes for which the right to counsel has not yet attached are admissible to prove "those" offenses."(Id, at p. 180, fn. 16) It appears to follow that if the statements as to Shauna were admissible to prove the Shauna charges, they were not admissible to prove the Kristen charges.

Accordingly, review is necessary to consider the application and scope of McNeil in these two important respects.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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